

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Rulemaking to Implement the Commission's  
Procurement Incentive Framework and to Examine the  
Integration of Greenhouse Gas Emissions Standards into  
Procurement Policies

Rulemaking 06-04-009

**PHASE 1, DRAFT INTERIM DECISION:  
GREENHOUSE GAS EMISSIONS PERFORMANCE STANDARD  
REPLY BRIEF  
OF THE PEOPLE OF THE STATE OF CALIFORNIA,  
ex rel. EDMUND G. BROWN JR., ATTORNEY GENERAL**

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Dated: January 8, 2007

Attorneys for the People of the State of California

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OF THE STATE OF CALIFORNIA**

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**I. INTRODUCTION**

The Attorney General submits this Reply Brief pursuant to the notice accompanying the Proposed Interim Decision on Phase I Issues: Greenhouse Gas Emissions Performance Standard. The Attorney General has previously submitted briefs and comments in these proceedings and hereby incorporates those by reference. The Attorney General provides this submittal pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. (See Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) This submittal is made on behalf of the Attorney General and not on behalf of any other California agency or office.

In this Interim Proposed Decision Reply Brief, we respond briefly to legal issues raised by the Center for Energy and Economic Development ("CEED") in its opening submittal on the Interim Proposed Decision. Because we have previously responded to similar arguments raised by CEED (see Attorney General's Legal Issues Reply Brief, filed July 10, 2006 and Response to CEED, filed October 31, 2006), we respond here only to present some additional points with respect to CEED's argument that the Proposed Decision conflicts with United States' foreign

policy. The logical extension of CEED's argument is that *any* action by a state or state regulatory body addressing global warming or greenhouse gas emissions conflicts with U.S. foreign and domestic policy and is preempted. As set forth below, the Attorney General concludes that CEED misrepresents U.S. foreign and domestic policy on this subject and presents no legal support for its view.

## **II. DISCUSSION**

### **1. Commerce Clause**

In its Comments on the Proposed Interim Decision, CEED repeats its argument that the Performance Standard violates the Commerce Clause of the United States Constitution. CEED presents no new arguments, and the Attorney General continues to conclude that the Standard does not violate the Commerce Clause, for the reasons set forth in our July 6, 2006 and October 31, 2006 submissions.

### **2. Foreign Policy**

CEED once again contends that the Performance Standard conflicts with U.S. foreign policy, which it describes as "work[ing] with other nations to achieve a coordinated response to global climate change," and "not mandating unilateral reductions in CO2 emissions from United States sources." (CEED Comments at 20 (Jan. 2, 2007).) We have responded to this argument before (July 6, 2006 submission), and briefly supplement that response here. First, it is hard to imagine how the Performance Standard will conflict with a federal policy to "work with other nations" for a coordinated global warming response. Second, under CEED's formulation, any action addressing any aspect of greenhouse gas emissions or global warming by the PUC, the State of California, or any entity other than the federal government will run afoul of federal foreign policy if it has the effect of reducing greenhouse gas emissions. In essence, CEED contends that U.S. foreign policy precludes domestic reduction of greenhouse gas emissions, particularly if mandated by a state agency. This absurd result is not supported by facts or law.

In support of its rendition of U.S. foreign policy, CEED cites to U.S. EPA's "denial of petition for rulemaking," which is currently the subject of Supreme Court review in *Massachusetts v. EPA*, No. 05-1120 (U.S. Supreme Court, 2006). EPA concluded that it "believes that the [Clean Air Act] does not authorize regulation to address global climate change." (Control of Emissions 68 Fed. Reg. 52922-02, 52924 (Sep. 8, 2003).) In its foray into

foreign policy, EPA states in the petition denial that “[u]nilateral EPA regulation of motor vehicle [greenhouse gas] emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies.” (*Id.* at 52931.) It is difficult, at best, to discern U. S. foreign policy precluding state action from the EPA statement.

In fact, the federal government has stated its support for state actions, including mandatory controls of greenhouse gases. For example, in his testimony before Congress, the Chairman of the White House Council on Environmental Quality stated, apparently supportively, that “[m]any of our states and cities are experimenting with . . . portfolios of voluntary measures, incentives, and locally relevant mandatory measures.” (Testimony of James L. Connaughton Before the U.S. House of Representatives Committee on Government Reform (July 20, 2006) at 4.)<sup>1/</sup> Connaughton also stated that the Bush Administration welcomes “effective state action to complement” federal efforts. (Statement of James L. Connaughton, quoted in “California Tighten Rules on Emissions,” NY Times (Sept. 1, 2006).) And in his statement to the United Nations Framework Convention on Climate Change, the Head of the U.S. Delegation, Dr. Harlan Watson, stated:

I would like to highlight the efforts being made by State and local governments in the United States to address climate change. Geographically, the United States encompasses vast and diverse climatic zones representative of all major regions of the world—polar, temperate, semi-tropical, and tropical—with different heating, cooling, and transportation needs and different energy endowments. Such diversity allows our State and local governments to act as laboratories where new and creative ideas and methods can be applied and shared with others and inform federal policy—a truly bottom-up approach to addressing climate change.

(Statement of Dr. Harlan Watson, Senior Climate Negotiator and Special Representative and

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1. Under Rule 13.9 PUC Rules of Practice and Procedure, the Attorney General requests official notice of the (1) the Testimony of James Connaughton, Chairman, White House Counsel on Environmental Quality, before the Hous Comm. on Gov. Reform (July 20, 2006); (2) Connaughton statement in New York Times (Aug. 24, 2005); (3) Statement of Harlan Watson, Senior Climate Negotiator and Special Representative and Head of Delegation, to the Ninth Meeting of the Parties to the United Nations Framework on Climate Change, Milan (Dec. 4, 2003); and (4) Watson statement, Conference of the Parties 11/MOP 1 Press Conference, Montreal, Canada (Nov. 29, 2005). These documents are attached, as they were submitted, along with a declaration of authenticity, in *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04-CV-06663-AWI (E.D.Cal).

Head of U.S. Delegation, Ninth Session of the Conference of the Parties, U.N. Framework Convention on Climate Change (Dec. 4, 2003).)

So what exactly is the United States' foreign policy and its relation to state actions on global warming? The federal policy encourages state action with respect to global warming.

CEED cites *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), for the unsurprising proposition that state action is preempted if it interferes or conflicts with foreign policy established by the political branches. Both *Crosby* and *Garamendi* involve state statutes that expressly reference the laws or conduct of foreign governments and foreign businesses with the obvious objective of applying state pressure to change those laws or conduct. The Performance Standard has no such intent. In *Crosby*, the Court struck down a Massachusetts law that imposed trade sanctions on companies doing business in Burma. The Court found that the state law, designed to pressure the Burmese government, imposed "a different state system of economic pressure against the Burmese political regime" that would "blunt the consequences of discretionary Presidential action" under a federal sanctions law with the same objective. (*Crosby*, 530 U.S. at 376 (footnote omitted).) California's suit has no relation to foreign government laws or policies.

In *Garamendi*, the Supreme Court struck down a California law that compelled European insurance companies' disclosure of Holocaust-era policy data as a condition of doing business in the state. Citing a "clear conflict" between state law and an executive branch agreement with European governments to secure compensation from those companies through other means, the Court found that the state law imposed a state system of economic pressure at odds with the federal agreement. (539 U.S. at 423.) Unlike *Garamendi*, in which the Court found that the state act stood in the way of federal diplomatic objectives evidenced by the executive agreement, the Performance Standard involves state utilities and their purchases only with no implications for any foreign policy prerogative, even if a particular foreign policy could be discerned.

Both *Crosby* and *Garamendi* involved conflicts between state laws and federal foreign policy objectives explicitly set forth in either a federal statute or an executive agreement. Here, there is no federal law or executive agreement embodying the policy of foreclosing domestic action by a state.

Finally, CEED cites *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 456 F.Supp.2d

1160, 1175-83 (E.D.Cal. 2006) for the proposition that requiring mandatory greenhouse gas emissions conflicts with U.S. foreign policy. (CEED Comments at 21.) The Attorney General represents California in that litigation. CEED has flatly misrepresented the court's holding. The court determined that plaintiffs in the case are not precluded as a matter of law from presenting evidence that U.S. foreign policy may conflict with California's regulations controlling greenhouse gas emissions from mobile sources. The court has not, in any way, made any finding concerning what the foreign policy of the United States is or whether it conflicts with any state action.

### 3. Domestic Policy

CEED renews its federal law preemption arguments, which we have previously addressed in our July 6, 2006 submission.

### **CONCLUSION**

As set forth above, and more extensively in our previous comments and briefs, the Commission has jurisdiction and authority to issue the Standard, and none of the federal constitutional arguments raised by CEED withstands scrutiny. We therefore encourage the Commission to proceed with its effort to promote a system of power delivery for California that is not reliant on the continued supply of GHG-intensive and inefficient electricity sources.

Dated: January 8, 2007

Respectfully submitted,

EDMUND G. BROWN JR.  
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### DECLARATION OF SERVICE

Case Name: Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards Into Procurement Policies

Case No.: Public Utilities Commission Case No. 06-04-009

I declare:

I am employed in the Office of the Attorney General, 1515 Clay Street, P.O. Box 70550, Oakland, California 94612-0550, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause.

On January 8, 2007, I electronically transmitted the attached **PHASE 1, DRAFT INTERIM DECISION: GREENHOUSE GAS EMISSIONS PERFORMANCE STANDARD REPLY BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN JR., ATTORNEY GENERAL** as follows:

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Executed on January 8, 2007, at Oakland, California.

  
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Esther McDonald